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THE FREQUENCY OF PERJURY.

A notable conviction has been obtained lately in New York County. A former Vice-President of a great insurance company has been found guilty of perjury and sentenced to serve six months in the penitentiary. He might have been condemned to ten years of imprisonment; but physicians testified that a long sentence would amount to one of death, moreover the jury recommended and the evidence made for mercy. It appeared that he gave the testimony which was the subject of the indictment not for self-serving motives, but in an attempt to shield others, and under advice to avoid inquiry as to a certain account. He had almost attained man's three score and ten years, and was in feeble health. For him conviction of crime was itself a dire punishment. His long life in the community had been esteemed blameless. His fellows considered him to have been a man of truth and honor; and as many of them as were called to the witness stand so testified. He was charged neither with wrongdoing toward the insured, nor breach of faith towards his former business associates; on the contrary it was keeping faith with the latter that made him "falsely true." It was not alleged, or shown, that he had expected to benefit personally, or to wrong any individual by his testimony, which was given under these conditions: When the accused was called before the Grand Jury as a witness in the general investigation of the insurance companies, the District Attorney, already apprised that a certain bank account in the Vice-President's name was actually a secret account of the Company, digged a pit; the witness fell into it and dismally failed to scramble out. He was not advised that his testimony might be used against him. The perjury alleged was predicated upon answers to questions apparently framed not so much to elicit information already in the inquisitor's possession as to test the witness, who, being technically

under affirmation but not under oath, at first said that the account was his own, but subsequently corrected his testimony and stated the actual fact, that in truth the money belonged to the Company, had been received by him under its president's direction, and had been a sore burden upon his mind. Thus before the completion of his testimony he had told the whole truth; but none the less he had spun for the present his own rope; for upon these conflicting statements made in his individual capacity after the expiration of his official relation with the Company, and not upon proof of anterior wrongdoing as its officer, he was indicted, tried, convicted, sentenced.

These facts present an interesting question as to the true boundaries of that charitable domain of law, the *locus pœnitentiæ*. To justify conviction the jury had to find that the answers upon which perjury was predicated were *willful* falsehoods, material to the issues under investigation and not expiated by the subsequent truthful statements; that the testimony, which in the event and at the same examination presented in its entirety the truth, was nevertheless perjurious in detail, and that the accused by turning away from the false answers and disclosing the truth had yet failed to save his soul alive. Obviously a witness who has made a false statement, whether in confusion, or deliberately, from self-serving motives or out of mistaken loyalty or generosity to others, will be slow to correct it if he realize that contradictions in his testimony will subject him to prosecution for perjury. How far this consideration should be weighed in enforcing the law of perjury, is a pretty subject for debate between father Chrysippus of the Stoics and the milder philosophers. The one thing certain is, that the law is not so enforced in general. And the thesis here is that even gross, palpable and persistent perjuries daily occurring are suffered to pass without chastisement by the ministers of the law.

Undeniably the man in the street has for this defendant a sympathy, in which the trial Judge, by his sentence, and the jury and District Attorney, by their recommendations to mercy, appear to have shared. The accused is generally considered to be a scapegoat; but this is not quite true. That useful, vicarious animal carried off into the wilderness the iniquities of the entire congregation; leaving them to start afresh upon the primrose path; but this unfortunate man bears only the burden of his own offence committed long after the official misdoings disclosed by the insurance investigation; and his conviction is in no sense a punishment of or

an atonement for any one of them. To the multitude who have clamored for punishment of the Company's officials it may, perhaps, seem to be in the nature of atonement that one of them has been convicted of any offence, even of one committed after the termination of his official life. But this error is obvious. No officer of the Company has been convicted of any criminal act in his official capacity; and the penalty here inflicted is rather analogous to that of a boy spanked for concealing an accomplished raid by his comrades upon a tempting orchard; his fellows escaping unwhipped and their plunder remaining undisgorged.

The case, while not complicated or difficult in itself, is nevertheless interesting in more ways than one. The jury were charged, of course, to acquit unless defendant were proved to be guilty "beyond a reasonable doubt." But after judgment the trial Judge granted a certificate that there were reasonable doubts as to (1) whether or no the substance of the controversy or matter in respect to which the perjurious testimony was material was stated in the indictment with sufficient certainty; (2) whether or no there was a fatal variance between the indictment and the proof, the indictment charging the taking by the defendant of his corporal oath before the Grand Jury and the proof establishing the taking of an affirmation only; two law points with which the jurors presumably in no way concerned themselves. Thus the case illustrates the anomalous but, perhaps, merciful procedure in New York, whereunder a jury, instructed by the Court, may fail to find any reasonable doubts, yet after their verdict of guilty the trial Judge who submitted the case to them may find for the Appellate Court's consideration, when the stigma of conviction has been branded upon the defendant, several doubts as to whether the case was properly submitted and decided. Whether a juster and more logical procedure might not be devised to prevent this moral and social disfigurement of the accused, by settling the formal law of the case before its submission to the jury, is not a question for discussion here, however important it may be in itself.

Psychologically the case is one for interesting speculation upon the sanction of an oath. Reason as we may, all of us are in greater or less degree under the spell of tradition and in the thrall of inherited ideas. To the logical mind, even though anthropomorphic in its theology, a lie being a lie, should be quite as offensive to Deity whether uttered as a false oath under formal requirements of the law, or as a false affirmation made in the belief that the

Almighty winks at untrue testimony so long as His attention is not particularly called to it by a special promise to tell the whole truth under penalty of His displeasure. It is a fair contention that oath-taking belittles God's majesty, attributes to Him man's weakness, and makes unverified falsehood a matter of small account; therein lies reason for the command to swear not at all, but to let communications be yea, yea, and nay, nay. Our forefathers, however, laid as little store by this divine injunction as by many others. They swore mightily by God's name and blood, by Saints, halidoms, and cross-hilted swords, even by their beards. We have inherited in varying degrees their awe of an oath and their toleration of unverified falsehood. A famously disreputable attorney of New York City in days gone by had a peculiar little fetich of his own. Never trustworthy under promise or stipulations, if he could be induced to pledge that curious asset, his "professional honor," he "leaned backward." Our modern procedure seeks to meet real, or merely avowed, conscientious objections to oath-taking by allowing affirmations under the mundane penalties of perjury,—pains and penalties so rarely inflicted as to have become the mere "rumble of a distant drum"; but although false affirmation is in law as perjurious as false swearing there are still witnesses who, if they can kiss their thumbs instead of "the book," will lie without hesitation; others who, unless sworn with covered heads, are prepared to tell any number of bald falsehoods, and yet others, even among the intelligent, to whom the ancient superstition, that God will punish a duly verified lie while overlooking a false affirmation, remains the strongest deterrent from false testimony. It is amusing to notice how many persons of light and leading still "knock wood" to avert an evil omen, as Dr. Johnson rubbed street posts, and interesting to speculate whether in a given case a witness has not felt more at liberty to adapt his testimony to the circumstances, if under affirmation only, than he would have felt if under oath.

What is of far more interest and importance to the public at large, and to the ministers of the law, than either the technicalities upon which are based the certified doubts as to the validity of this insurance officer's conviction, or metaphysical speculations upon the general obligation of an oath, is the fact that a Metropolitan jury against its sympathies, has found guilty of perjury a man of excellent repute because before the grand inquisition he made a misleading statement, confessed and retracted before the particular inquiry was over. For once the pains and penalties of perjury have been inflicted in a conspicuous instance. The sympathy expressed

for defendant is due in no small part to the fact, already adverted to, that every day men go unpunished for more flagrant perjuries than his. A Grand Jury in Columbia County, some time ago, refused to find an indictment for this offence upon evidence clear to mathematical demonstration, and when a Judge of the Supreme Court sent the case back to another Grand Inquest they, too, refused to find a bill; whether out of sympathy, or for less worthy reasons, one may only surmise. In Herkimer a Grand Jury thrice refused to indict a man upon uncontradicted evidence and despite specific instructions of a Justice of the Supreme Court, amounting to severe rebuke; the jurors in both cases violating their own oath of office.

Yet there is no dispute as to the gravity of the crime of false swearing. The District Attorney, in the insurance officer's case, asked and the trial Judge inflicted, a substantial sentence upon the ground, as expressed by the latter, that "This is a crime that strikes at the very root of justice." It would be highly improper, while this cause is still *sub judice,* to express here any opinion as to the merits of the appeal or the intrinsic justice of the judgment already rendered; but as a general statement the judicial utterance quoted is sound; and a crime that strikes at the root of justice should not be lightly passed over by the Courts, as perjury frequently is when not itself a direct issue in the case.

The Court of Special Sessions in the City of New York wherein, perhaps, more cases are heard and more false testimony given than in any other tribunal, except the Magistrate's Court, serves for illustration. Its justices sit both as Judges and jurors, triers of the fact and expounders of the law. The cases tried before them are misdemeanors and largely of the class of *mala prohibita,* violations of excise and speed laws, of statutes regulating the purity of food, the practice of regulated businesses, such as medicine and dentistry, and kindred ordinances; disobedience of which does not necessarily imply the moral obliquity that attaches to the *mala per se,* of which perjury is one. When upon an issue of fact those justices find guilty a defendant who upon the witness stand has wilfully denied the main fact in issue, they necessarily believe him beyond reasonable doubt to be guilty not only of breaking the Statute, without which the act might be innocent, but also of perjury, which is *malum per se* and a grave crime at Common Law. This Court is not one of record,[1] and therefore is not one of those to which the power of summary commitment for perjury has been

[1] *In Re* Deuel (1906) 116 App. Div., 512.

specifically given by the Penal Code,[2] but its justices, being Magistrates, may take cognizance of crimes committed before them, and, possessing the power to punish within defined limitations offences under their jurisdiction, they may properly consider in awarding punishment all the circumstances of the case; yet it is not rare to see a man, who, in order to escape judgment, has denied under oath the issuable facts, sentenced no more severely than the honester offender who pleads guilty, refusing to deny the facts and to hide behind false testimony. The truth seems to be that in daily practice both Bench and Bar have ceased to be shocked by ordinary false swearing. They may sometimes even laugh—as Jove did "at lovers' perjuries." Furthermore, the justices may reason that the false swearing may and should be punished in a separate action, where all technicalities of proof may be availed of, and there is, theoretically, force in that argument; yet it is quite safe to say that if persons tried in that Court understood that upon conviction they would receive an enhanced punishment for defending by a false oath, perjury would be sensibly diminished in at least one tribunal. Moreover, as against the argument that a defendant's false swearing should only be weighed in a separate trial for perjury, it is to be observed that in small cases, though involving gross perjuries, which are none the less sturdy blows at the root of justice, prosecutors are not swift to pursue the criminal. A case is recalled where a defendant was told from the Bench, and with truth: "You are guilty of perjury and should go to the penitentiary," and another, in which an attorney, endeavoring to maintain his client's defence to an action on a forfeited bail bond, took the stand and swore that the bondsman had not been in Court, at a time when the record in evidence showed the contrary. These instances occurred in different Counties, and in presence of the prosecutor, but neither of the false witnesses was proceeded against. They were not shining marks, and the technicalities of the rule against perjury operated to make the event of prosecution doubtful; as to the falsity of the testimony there was no doubt, but its materiality to the issue was not so clear. In a third County, where the prosecutor did act upon mathematically demonstrated evidence of perjury, the Grand Jury twice refused to indict, as already mentioned.

Legal periodicals from time to time advert to this crying evil of false testimony with brave words. The Bench declaims against

[2] Sec. 102.

it. In a case of disbarment just reported, the Appellate Division mentions the perjury of the accused attorney as capping the climax of his offences. A President of the State Bar Association in his annual address some years ago said very truly: "If the lawyers of this State would positively discourage false swearing on the part of their own clients and honestly endeavor to have it punished when committed by the clients or their adversary, the crime would grow suddenly less." Borne along by his enthusiasm he went further and said: "It is the professional duty of every lawyer to do this; he owes it to his fellow man; he owes it to his Country, and he owes it to his God." The words are of record; but whether the orator ever performed this solemn duty in a specific instance, or whether he has been so fortunate as never to be placed in circumstances requiring him to do so, history does not relate.

That a sentiment has long existed in favor of swift procedure against false witnesses was emphasized by Mr. Justice Gaynor of the New York Supreme Court in a trenchant paper, "How to Stop Perjury," appearing in *Bench and Bar* of January, 1907. Quoting Section 102 of the New York Penal Code which, embodying a statute antedating the last century, authorizes a Court of Record to commit summarily witnesses whose testimony before it appears probably to be false, or to take their recognizances with sureties to answer an indictment for perjury, the learned Judge says:

"The perjurer would no more dare to come forward in our Courts than in the English Court if he knew that our trial judges were in the habit of committing perjurers on the spot. Nor would any lawyer produce an obvious perjurer if he knew that to do so would mean his prompt disbarment."

By way of illustration the writer said that recent summary commitments of this sort in Kings County had had a surprising effect in causing the abandonment of so many causes on the day calendar that for weeks thereafter it became necessary to increase it in order to get a sufficient number of cases to keep the Court busy. The necessary conclusion from his argument is one that the essayist, instead of shrinking from by reason of his judicial position, states incisively:

"The chief responsibility for such perjury in the Courts is with the trial judges themselves. Do you ask why this is so? It is because they have the power to stop it and do not stop it."

And the explanation Mr. Justice Gaynor gives for the failure of *nisi prius* Courts to exercise the power he deems so salutary is this:

"The reason may be found in the proneness of appeal judges in recent years to meddle with and adversely criticise trial judges in matters submitted to the discretion of the latter for the orderly and safe administration of justice. A trial judge may feel reluctant to commit a perjurer during the trial of a case if on appeal some judge (and maybe, one who never tried a case) is to hem and haw over his conduct, and say maybe it influenced the jury—just as though it should not have its legitimate influence like everything else in this world—and so on."[3]

Commenting upon that paper the able editor of *Bench and Bar* in subjoined note says:

"It is almost incredible that although the salutary provision of law to which Mr. Justice Gaynor calls attention has been in existence for more than a century there is only one *recorded* instance of summary commitment for perjury, so far as the research of the industrious annotators of our Penal Code has brought to light. * * * The 'one recorded instance' referred to above was the case of *Lindsay v. People* (1875), 67 Barb. 548, which was a prosecution for murder."[4]

Certainly an experienced and able judge should be better able than a member of the Bar or a text-writer to divine the reasons why his fellows on the Bench abstain from exercising a discretion expressly given by Statute. Yet it may be suggested, with all deference to higher authority, that there is a more charitable explanation than apprehension of reversal for judicial failure summarily to commit false swearers in Courts of Record, or to punish them

[3] The learned Judge probably had in mind certain cases collected in an article by the present writer entitled "Misconduct of the Bench as Reversible Error," in *Bench and Bar*, April, 1906, in which it was said: "So it was held to be reversible error for the Court to say, in an action for damages for indecent assault: 'If the Grand Jury was in session I should order this case before it,' and to recommend the District Attorney, who was present as a witness, to take cognizance of it. Davison *v.* Herring (1897) 24 App. Div. 402. Yet while it may be such error for the Court to express an opinion as to the credibility of a witness in a close case, especially if it be a criminal action, as, for example, to bid a defendant on trial for perjury to stop 'quibbling' and answer the question, People *v.* Hill (1899) 37 App. Div. 327, it is not necessarily error for the Court on trial and in the jury's presence to commit to jail a witness of one of the parties because of the character of his testimony given in the case. People *v.* Hayes (1894) 140 N. Y. 484. But the evidence of perjury should be convincing to justify this drastic action; and it has been held ground of reversal in a close case for the Court to say that a witness who testified that he saw a train approach without signal has either told the truth or committed perjury, thus eliminating the question of his mistake. Smith *v.* Lehigh Valley R. R. Co. (1902) 170 N. Y. 394."

[4] The case of People *v.* Hayes (1894) 140 N. Y. 484, cited in the footnote, *supra*, discloses another, which the learned editor adverts to later in his note.

in lesser tribunals, namely, the doubt whether the falsity and materiality of the suspected testimony is susceptible of proof, and the fear that such commitment of a witness, save in a manifestly clear case, might work injustice to an innocent party by prejudicing his possibly just cause with a jury. Like all summary powers this one of commitment is susceptible of abuse. Freely exercised by an unjudicial judge it would work evil. But when the Court sits both as judge and trier of facts the fear of improperly biasing the jury is not a factor in the decision; and when its verdict of guilty necessarily finds the defendant to be a perjurer, his punishment may justly be enhanced for that reason.

But it is not only in the court-room that false swearing flourishes. The offices of careless or corrupt attorneys raise a fine crop of the weed. The theory of the New York Code of Civil Procedure, and of other codes based upon it, seems to have been, and to be, that if an oath or affirmation be required to every formal pleading or statement, affiants will abstain from wilful falsehood, or, failing so to do, will suffer punishment. The result is very different from that apparently anticipated. Clients, especially corporate officers, verify pleadings with the vaguest ideas of their contents; and are constantly confronted in Court with their formal sworn statements contrary to their testimony upon the witness stand. This does not necessarily mean that in every instance the affiant knowingly, deliberately, and in order to deceive has made a false oath. It does mean, as a rule, that both he and his attorney consider an oath, and still more an affirmation, to be a formality as trifling as signing one's name. The Regents of the University of New York have erected the like paper bulwark about their examinations for the certificate required of students as preliminary qualification to the study of Law, Medicine, Dentistry, etc., by requiring oaths as to the identity of candidates, and other matters. The laws regulating the practice of those professions require licentiates to swear to certain facts upon registering. Perjuries under these requirements are constant. Until recently the Custom House authorities called upon a traveller returning from abroad to verify on the steamer a statement as to his dutiable effects. It is safe to say that over fifty per cent. of those declarations were untrue, and that their signers neither knew nor cared whether they were swearing to them. Deceit of the inspectors was a merry jest. Fortunately this fertile source of perjury has been done away with.

The manner in which the oath is administered in the great

majority of instances is not of a nature to impress the affiant. Many a notary is content to mumble: "Swear to this?" as he signs his name, not waiting for an affirmative answer, or making any inquiry as to the identity of the affiant. It is not strange then that instead of being a solemn and impressive act, as it was designed to be, the oath has come to be regarded as an idle formality, and is daily taken perfunctorily and with little thought of its truth. It has been said that in the Army a rule formerly existed—perhaps it still exists—holding officers liable for all missing equipment not certified to have been lost in storm or battle, and that a common result of this regulation was that lost or discarded articles were carried upon the lists until the occurrence of one of those two events, when "the affidavit sergeant" was called upon to make oath connecting the loss with the justifying occasion. One dislikes to think this of the service with which we particularly associate truth; and prefers to believe that the report is one of imagination, or at all events, that the post of "affidavit sergeant" was a rare detail; but *si non è vero, è ben trovato;* the story illustrates Tristram's Creed, "the vow that binds too tightly breaks itself."

But this evil of reckless swearing, which the Codes have enhanced by increasing the number of affidavits, is not a new one. The American Bar Association, in its laudable effort to maintain high professional standards, has sent out lately to its members a copy of Judge Sharswood's admirable Essay on Professional Ethics, originally published in 1854, as a compend of his lectures on professional aims and duties delivered to his Law Class in the University of Pennsylvania. Here is this eminent jurist's idea of an attorney's obligation in framing an affidavit:

"The client will be often required, in the course of a cause, to make affidavits of various kinds. There is no part of his business with his client, in which a lawyer should be more cautious, or even punctilious, than this. He should be careful lest he incur the moral guilt of subornation of perjury, if not the legal offence. An attorney may have communications with his client in such a way, in instructing him as to what the law requires him to state under oath or affirmation, in order to accomplish any particular object in view, as to offer an almost irresistible temptation and persuasion to stretch the conscience of the affiant up to the required point. Instead of drawing affidavits, and permitting them to be sworn to as a matter of course, as it is to be feared is too often the case, counsel should on all occasions take care to treat an oath with great solemnity, as a transaction to be very scrupulously watched, because involving great moral peril as well as liability to public dis-

grace and infamy. It lies especially in the way of the profession to give a high tone to public sentiment upon this all-important subject, the sacredness of an oath. It is always the wisest and best course to have an interview with the client, and draw from him by questions, whether he knows the facts which you know he is required to state, so that you may judge whether, as a conscientious man, he ought to make such affidavit."

Very much laxer was the practice of the attorney who, having dictated on Saturday afternoon an affidavit for use on Monday morning, and being in haste to leave the city, directed the stenographer to indicate whereabouts on the page his transcription would end, and there made his signature and verification on the blank sheet.

Even as this is written the daily press of New York City announces the dismissal from its police force of an officer upon a charge of securing by perjury the conviction of a citizen indicted for burglary. Not only did this policeman, according to the allegations, falsely testify to seeing the citizen with his hand in a cash register, but, meeting a fellow officer on the way to the station, he compelled the latter to corroborate the story. This second policeman eventually confessed the perjury, and upon his testimony the principal perjurer was tried, but after some five hours' deliberation by the jury acquitted. The Police Commissioner, however, found in the evidence sufficient ground to dismiss the principal. But the accomplice he retained on the force and detailed to the Headquarters Squad in order that he might not be "pounded" for telling the truth, at the same time reading to all the available men of the station a lecture in which he said, as reported:[5]

"You men know as well as I do what the general reputation of a policeman's testimony is in the criminal Courts of this town. I am sorry to say I know, and you men know that it is rather against the force"; and again: "You and I know that it is the tradition of this force to hang together and to give testimony in one another's favor, no matter what the facts are. And I know as well as you know that lots of men on the force are pounded for going against that rule—and that is a shame to the force."

In all this there is, most unfortunately, nothing new—nor does the shame of it attach to one city alone. Not only in the halls, but in the purlieus of justice and by the mouths of its lesser ministers is this grievous offence committed habitually. If in the case of the

[5] In reply to inquiry at Police Headquarters this report was said to be correct.

insurance official the *locus pœnitentiæ* was practically non-existent, in the case of the peaching policeman it was wide as the horizon. Here were two officers of the law charged with a most hideous crime against justice in seeking deliberately to send a citizen to State's prison by their perjured testimony. The principal criminal is acquitted. His only punishment is dismissal from the force. His accomplice by confession escapes all punishment and receives a desirable detail in order that he may not be punished by his associates for revealing the truth and righting a wrong. If the evil is so widespread is it because the remedy is not commensurate? And if there is an adequate remedy why does this crime that saps the very root of justice go unwhipped more than almost any other?

In seven years, 1900 to 1906, inclusive, the District Attorney of New York County disposed of one hundred and seventy-three cases of perjury and obtained, including pleas of guilty, fifty convictions. There were four acquittals, thirty-eight dismissals by the Grand Jury, and eighty-one cases discharged. The leanest year was 1901, when eight cases were disposed of as follows: One conviction, three dismissals by the Grand Jury, and four discharges. The geatest was 1906, in which thirty-six cases were disposed of by twelve convictions, one acquittal, eighteen discharges and five dismissals.

During the same period the *Digest* shows nine appeals in criminal causes. It discloses also an instructive matter of discipline, *Re Lamb*,[6] wherein the respondent was disbarred for obtaining his client's verification to a complaint falsely alleging the plaintiff to be owner of certain stock, which pleading was supplemented by the attorney's affidavit that he knew the facts therein stated to be true. A plea that the offences alleged were committed in the United States Court and without the jurisdiction of the State Court was held to be unavailing; the Appellate Division saying: "There is no place within its (the Bar's) ranks for perjurers and suborners."

The crime is, technically, hard to establish by proof. At Common Law prior to the Statute, 23 Geo. II, Ch. 11, it was most difficult to frame a valid indictment for it. The statements upon which a charge of perjury is predicated must be not only false, but must be willfully and knowingly so; they must be material, and sworn to before a person, tribunal or body lawfully entitled to

[6](1905) 105 App. Div. 462.

administer the oath[7] which must be positive in terms unless the prosecutor is prepared to prove affirmatively that the affiant knew to be false what he swore to be true upon information and belief, a most difficult task.[8]

[7] In Case *v.* People (1879) 76 N. Y. 242, the plaintiff in error, President of an Insurance Company, was convicted of perjury in falsely swearing to its annual report. The judgment was affirmed at General Term; but the Court of Appeals, Folger, J., alone dissenting, reversed the judgment below for error in not directing an acquittal upon the testimony, which was in effect this: The notary before whom the affidavit purported to have been taken testified that it was sworn to before him and subscribed by him; but on cross-examination he had no recollection of it (he was apparently the ordinary notary of commerce) and admitted that he only inferred the verification from his signature. The prisoner testified that he never took the oath; two other witnesses testified that although signed in the Company's office, the report was not sworn to, but was taken by the porter to the notary, who certified it in the President's absence. The porter testified that he took the affidavit to the notary, who subscribed it and attached his seal. How valuable from the standpoint of such officials is the statute requiring sworn annual reports! How fine the sense of duty in the accommodating notary of whom the Court said, however: "While the motive of the notary, in thus sanctioning a loose, irregular and illegal mode of doing business of this kind may be considered, it is easy to see that it may be accounted for, without ascribing to him any criminal intention." In Lambert *v.* People, *infra*, one ground of reversal was error in refusing to allow the accused to show that the notary before whom he swore was a resident of New Jersey and therefore ineligible to hold his office in New York.

[8] Lambert *v.* People (1879), 76 N. Y. 220, reversed the General Term's judgment affirming the conviction of plaintiff in error, also President of an Insurance Company, upon a charge of perjury in verifying the Company's annual statement. The affidavit made by the President and Secretary stated that affiants were officers of the Company on December 31st last, that "all the above described assets were the absolute property of the said Company, free and clear from any liens or claims thereon, except as above stated; and,"—following the semicolon,—"that the foregoing statement, with the schedules * * * are a full and correct exhibit of all the liabilities * * * according to the best of their information, knowledge and belief respectively." The indictment charged this statement of assets as an absolute oath and only traversed its truth. The accused contended that the affidavit was on information and belief. The People urged that the qualification of information and belief only related to averments following the semicolon, all preceding it being absolute. It was conceded that if the entire affidavit was on information and belief the indictment should have traversed not only the falsity of the averments but of the affiant's belief. In the Court of Appeals three judges wrote opinions for reversal. On the construction of the affidavit Rapallo and Hand, JJ., agreed that it was positive in its averment as to assets, a fact, however, that "does not in the least degree prevent acquittal of the prisoner, if the jury find that he did not intend, in fact, to swear positively, but only upon information and belief as to these matters." Andrews, J., concurred with Miller, J., who, reading the main opinion, said that it would be going very far to hold that a person could be convicted of so flagrant a crime as perjury which, depending upon intent and knowledge, must be willful, corrupt and malicious, "upon the mere insertion of a single dot in a sentence, and solely upon a question of precise, accurate and grammatical punctuation." He further said: "To uphold the conviction here we must assume that the accused understood perfectly the effect of the affidavit; that he examined it critically, and considered the force of the commas and semicolons made therein; before he took the oath."

The falsity of the oath must be proved either by two witnesses or by one witness and strongly corroborating circumstances, although these circumstances need not be of sufficient probative value in themselves to establish the offence apart from the witnesses' testimony. At the Common Law it was not enough to show that the accused had sworn to diametrically opposite statements.[9] The prosecution had to show which statement was false. It has been sought in New York State to correct this defect by so amending the Penal Code as to provide that in any prosecution for perjury the falsity of the testimony set forth in the indictment shall be presumptively established by proof of defendant's contrary testimony under oath in "any *other* written testimony, declaration, deposition, certificate, affidavit, *or other writing by him subscribed.*"[10] Literally construed this would not apply to contradictory statements in the same action or proceeding, or to statements not in writing or not subscribed by the accused. The amendment has yet to go through the process of exposition by the Courts. But although the ancient technicality has been greatly reduced, the offence of perjury remains one of the most difficult to establish.

The sum of the matter is that both Bench and Bar have been over-lenient in respect to this crime. The remedies for it lie in cultivating a sterner sentiment in place of present apathy, and in the exercise by Courts of their summary powers—with due caution, but as the Statute contemplates—as well as in the slower and more technical criminal action. Attorneys encouraging and abetting in reckless affidavit-making should be disciplined by Bar Associations and the Courts. The efficacy of such a course is made apparent while the ink on this paper is still wet. In the prevailing "rent war" on the East Side of New York City, a Municipal Judge is said to have announced that he will hold attorneys, as well as the clients, responsible for perjured defences in dispossess proceedings. If such a course were consistently followed, the congestion of calendars would be greatly abated if not entirely relieved. Notaries should be held with us, as they are abroad, to a greater sense of responsibility. There can be no healthy civic life when the fountains of justice are poisoned by falsehood, where perjurers escape unwhipped, and perjury itself is a jest, as it is in the lesser Courts of a great City. Especially is this true when those who taint these fountains are the ministers charged to keep them pure. Zealous

[9] 1 Lewin C. C. 270.

[10] Ch. 324, Laws of 1906; Penal Code, Sec. 101a. The italics are ours.

but impractical reformers would have the police force not only protect our lives and property, and execute process, which is their true function, but also guard our morals. The foundation of good morals is truth-telling; and we have a consensus of opinion, illustrated by examples, that it is considered the correct thing for men on the police force of all cities to "hang together" even to the extent of perjury, a condition all the more saddening and deplorable when one considers the splendid courage and self-sacrifice constantly displayed by these same men in the line of duty, and realizes that, as New York City's Police Commissioner truly said: "The truthful men have to suffer in reputation for the liars." It would quickly become just as "honorable" for a policeman to tell the truth in every respect as it now is for him to lie in some regards, if public sentiment, and the action of Bench and Bar, were directed to that end.

W. A. PURRINGTON.

NEW YORK CITY.